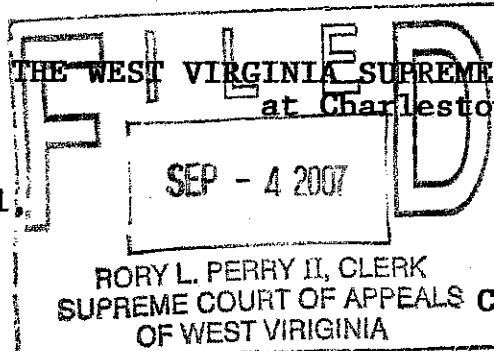


(COPY)

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
at Charleston



Rodger Mitchell,
Petitioner,

vs.

Jackson County Circuit Court;
as Honorable Judge Thomas Evans, III
Respondent.

PETITION FOR PEREMPTORY WRIT OF MANDAMUS

Comes forth the Petitioner, Mr. Rodger Michell, pro se and do present his Application for Petition for Premptory Writ of Mandamus pursuant to West Virginia Code, §53-1-3 for consideration and ruling by the Court.

JURISDICTION

Jurisdiction is conferred by West Virginia Code, § 53-1-2 with venue founded upon underlying Habeas Corpus, Jackson County Circuit Court Number: 06-C-08 from which a matter, adjudicable only in this court, has arisen. Further, "The Supreme Court of Appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition, and certiorari..." W.Va. Const., art. VIII, § 3, in part." Syl.Pt. 4, Foster v. Sakhai, 210 W.Va. 716, 559 S.E.2d 53 (2001).

PROCEDURE AND FACTS

Petitioner filed to the Circuit Court a Motion to Compel or to Replace Counsel 29 May 2007. (See, Appendix "A", attached and made to

record as such). The Grounds were that Court appointed Counsel refused to raise all the grounds the petitioner wanted to raise as required by Losh v. McKinzie, 166 W.Va. 762, 277 S.E.2d 606 (1981). This problem was brought to Counsel's (Mr. Micheal Payne) attention several times prior to the filing of this motion.

Counsel then filed his own Motion to withdraw, 30 May 2007 realizing an irreconcilable breakdown had occurred (Appendix "B", attached and made to record as such). After not hearing from the court or counsel, the petitioner filed a Motion for Disqualification of Judge, 02 July 2007 (Appendix "C", attached and made to record as such).

The Court has failed to rule on Counsel's Motion to Withdraw, Petitioner's Motion to have replacement counsel, or Petitioner's Motion for Disqualification of Judge (Evans). And is the subject of this petition. The Petitioner has since written the Court and requested ruling on these matters 12 August 2007 (Appendix "D", attached and made to record as such) giving the Court 20 days to respond or this action would ensue. That time expired, the instant action and intervention of this Court is warranted to end the unending delays and inaction by the Circuit Court. Petition seeks rule to show cause, and mandamus to issue.

REQUIREMENTS

"A writ of mandamus will not issue unless three elements coexist -

(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and, (3) the absence of another adequate remedy." Syl.Pt. 2, State ex rel. Kucera v. City of Wheeling, 170 S.E.2d 367 (W.Va. 1969); Syl.Pt. 1, Dadisman v. Moore, 384 S.E.2d 816 (W.Va. 1989); Syl.Pt. 2, State ex rel. Cooke v. Jarrell, 177 S.E.2d 1970). Syl.Pt. 2, State ex rel. Williams v. Dept. of Military Affairs et al., 212 W.Va. 207 (W.Va. 2002).

COURTS CONSIDERATION

In considering a petition for a writ of mandamus, the Supreme Court has taken the position that a writ of "[m]andamus is a drastic remedy to be invoked only in extraordinary situations; therefore, a party seeking such a writ must satisfy three conditions: (1) there are no adequate means for the party to obtain the desired relief; (2) the party has a clear and indisputable right to the issuance of the writ; and, (3) there is a legal duty on the part of the respondent to do that which the petitioner seeks to compel." Syl.Pt. 2, State ex rel. Sowards v. County Commission, 479 S.E.2d 919 (W.Va. 1996); Syl.Pt. 1, State ex rel. Billy Ray C. v. Skaff, 438 S.E.2d 487 (W.Va. 1993); Syl.Pt. 2, State ex rel. Kucera v. Cit of Wheeling, 170 W.Va. (W.Va. 1969); Syl.Pt. 1, State ex rel. AFC Industries Inc. v. Viewig, 514 S.E.2d 176 (W.Va. 1999).

1. CLEAR LEGAL RIGHT OF PETITIONER

The Petition avers that he has a clear legal right to present his

Habeas Corpus pursuant to West Virginia Code, § 53-4A-1 et seq., and West Virginia Constitution, Article III, § 4. Second the Petition has a right to redress in the Court of this state West Virginia Constitution, Article III, § 17 and to due process of law within the process and procedures set forth by the Court Rules of this State West Virginia Constitution, Article III, § 10 and Trial Court Rules, Rule 17.

The Petition (1) has no other adequate means of getting new counsel or moving forward in his Habeas Corpus without the appointment of counsel to aid his decisions. (2) The Petition has a clear right to have his issues adjudicated in the circuit court by the provisions of West Virginia Code, § 53-4A-1 et seq. (3) and being the circuit court has not ruled on any of the motions and is not protecting the petitioner's rights, a rule to show cause is required to issue and if, the circuit court then does not comply, Mandamus should ensue by this court.

RELIEF AND PRAYER

Wherefore, petitioner prays the Court to Grant a Rule to Show Cause, and His petition and such other relief as the Court deem appropriate. Be It So Prayed.

Respectfully Submitted,

Rodger Mitchell

Mr. Rodger Mitchell,

Petitioner/pro se

VERIFICATION

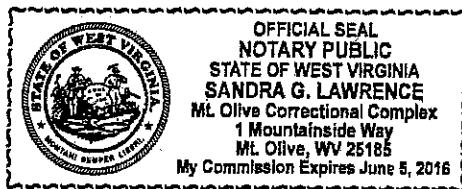
Petitioner avers all statements contained in this action are true and correct to the best of his knowledge and beliefs by signature affixed it is so sworn and attested.

STATE OF WEST VIRGINIA;

County of Fayette, to Wit:

Taken, Subscribed and Sworn before me a Notary Public in and for the County of Fayette and the State of West Virginia on this 21st day of August, 2007.

Affix Seal Below:



Sandra Lawrence
NOTARY PUBLIC OF FAYETTE
Rodger Mitchell
PETITIONER

CERTIFICATE OF SERVICE

I, Rodger Mitchell, do swear that I have cause to be served upon the below party a True and Exact copy of the foregoing Petition for Peremptory Writ of Mandamus by placing same in the United States Mail, First-Class, Pre-paid this 30 day of August, 2007. By Signature Affixed It Is So Sworn. Parties served include:

- 1) Honorable Thomas Evans, III
Circuit Court Judge of Jackson County
Jackson County Courthouse
Ripley, W.Va. 25271

Respectfully Submitted,

Rodger Mitchell

Mr. Rodger Mitchell
Petition/pro se

Appendix
A

IN THE CIRCUIT COURT
OF JACKSON COUNTY

MOTION TO COMPEL COUNSEL
OR TO REPLACE

STATE OF WEST VIRGINIA
-VS-
RODGER MITCHELL

CASE #02-F-22
HONORABLE JUDGE
THOMAS C EVANS III

On this date May, 29, 2007 comes the defendant Rodger Mitchell Pro-Se to motion the court to replace or compel current counsel to follow the laws and rules, or appoint counsel that will .

GROUND FOR MOTION

#1- Current counsel Mr, Michael Payne is refusing to follow the ruling made by the West Virginia State Supreme Court in the case of Losh-vs-Mckenie. Where they ruled that once the circuit court has found good enough grounds to grant a petitioners Habus Corpus and has appointed counsel for the petitioner, all issues must be raised. Mr, Payne is refusing to raise all the issues that he is aware of. By his refusing to raise all issues he is clearly in direct defiance of the ruling made by his States Supreme Court.

#2- Mr, M, Payne is also aware that if only the few issues, he is willing to raise is not 100% sure of getting his clients case over turned. Mr Payne knows he should in order to be competent and effective counsel raise, all the issues that are known to him no matter how petty he believes them to be. Mr, Paynes refusal to raise all the issues that are known to him proves he is more then willing to be ineffective as well as incompetent as counsel upon the defendants Habus. There by violating his clients right to due process.

#3- Current counsel Mr,M,Payne has reviewed the record of case 01-F-25, and then case 02-F-22 with all of the information provided to him by the defendant along with the information that should have been provide to him by previous attorneys This information points out and would prove massive amounts of wrongs, misconduct as well as crimes that was committed against his client by the Court,and prosecutors office long before this trial was conducted. Mr,Payne is refusing to follow rules of law, as well as the rules of lawyer Disciplinary Conduct set down by the West Virginia State Bar and report this matter to the proper authorities for what it really was and is, A white collar kidnaping.

#4- Mr,M,Payne COURT appointed counsel for the defendant is also well aware this matter should be reported as well as put before a grand jury. Mr,Payne is well aware that once all of the issues are raised from the start to the finish of the two cases 01-F-25, and then 02-F-22,((The cases that the State prosecutor told to the Court,and to Mr,Cosenza had the SAME discovery.)) There would be no doubt what so ever,that it was due to the belief of the Court, State prosecutor,trial defense counsel, and others in Jackson County of the defendants guilt. That a conspiracy was formed between them to obtain and maintain this conviction.These issues would also prove that this conspiracy is still going on to date to maintain this conviction.

#5- The defendant not being incompetent as he was before, and during this so called trial. Declares that once these issues are raised onto the record,then also put before a Federal Prosecutor. There would be no doubt what so ever that Case 02-F-22 was noting more or less then a white collar kidnaping plot put together by the Jackson County Court,the Jackson County Prosecutor,trial defense counsel George J Cosenza,and others in Jackson County to look like a legal prosecution.Due to" their belief that the defendant was guilty,as well as the

other reasons needed to make sure that the defendant was found guilty."

It is due to the above said grounds or issues that the defendant moves the Court to order counsel to, or appoint new counsel that will follow the law, the rules of disciplinary conduct. Thereby making it to where counsel can care more about their country mens rights, as well as their clients rights then defense counsel fears the courts. By doing this counsel will be able to make the necessary motions and reports. The necessary motions and reports needed to put an end to this kind of intentional miscarriage of justice, and the knowing violations of laws and persons rights accused of crimes in Jackson County.

Respectfully Submitted

Bobby Mitchell

Defendant Pro-Se

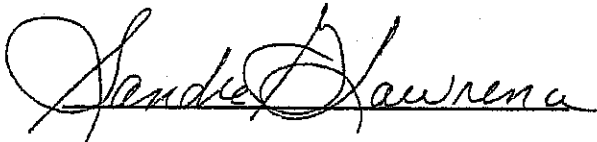
Certificate of Service

I Rodger Mitchell Pro-Se do hereby certify that Three copies of the forgoing Motion was duly served upon the Jackson County Clerks Office by the U,S Postal Serves First Class Postage prepaid on this date May,29,2007.

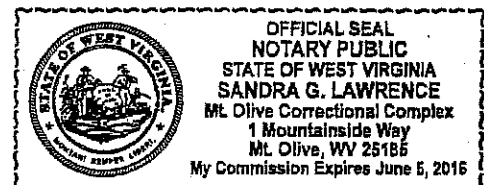
Rodger Mitchell-06561-2
M,O,C,C # 1 Mountainside Way
Mt,Olive West Virginia
25185



Petitioner Pro-Se



Notary



Redman, Payne & Muldoon, PLLC

Attorneys at Law

100 Capitol Street
Suite 1009
Charleston, WV 25301
Fax (304) 342-6876

Trent A. Redman
(304) 720-5114

Michael D. Payne
(304) 342-6800

James Muldoon
(304) 342-7050

May 30, 2007

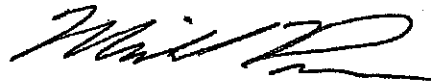
Keith E. Brotherton
Circuit Clerk for Jackson County
P.O. Box 427
Ripley, WV 25271

Re: Mitchell v. Warden, Mount Olive Correctional Complex
Habeas Case 06-C-8

Dear Mr. Brotherton,

Please find the enclosed "*Motion to Withdraw*" for filing in your office. If you have any questions, please do not hesitate to contact my office.

Sincerely,



Michael Payne

Enclosure

cc: The Honorable Thomas Evans, III
Shannon Baldwin, Esq.
Rodger D. Mitchell

IN THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

RODGER MITCHELL

Petitioner,

V.

CASE No. 06-C-8

WARDEN, Mount Olive
Correctional Complex

Respondent,

MOTION TO WITHDRAW

COMES NOW Petitioner, Rodger D. Mitchell, by counsel, Michael D. Payne, and moves this Court to remove him as counsel in this matter and appoint new counsel at the earliest possible opportunity. In support of this motion, counsel states as follows:


1. The Petitioner is presently incarcerated at Mt. Olive Correctional Complex.
2. Michael D. Payne has been appointed to assist Mr. Mitchell with his Petition for Writ of Habeas Corpus.
3. Defendant Mitchell has expressed his dissatisfaction with this counsel. Moreover, Mr. Mitchell believes that Michael D. Payne is involved in a conspiracy, along with this Honorable Court, the Prosecuting Attorney, and all other past attorneys appointed to represent him to cover up a "white-collar kidnapping" of Mr. Mitchell.
3. Moreover, Mr. Mitchell has filed an ethics complaint against Michael D. Payne alleging that Michael D. Payne has actively covered up the actions of this Honorable Court, the Prosecuting Attorney and others. The Office of Disciplinary Counsel has dismissed the complaint, and Mr. Mitchell has appealed that decision.

3. The attorney client relationship between Mr. Mitchell and this counsel has deteriorated to the extent that cooperation is not possible. Under these circumstances, Mr. Mitchell's right to be represented by counsel will be adversely effected unless new counsel is appointed.

WHEREFORE to ensure a fair Habeas Corpus hearing, this counsel respectfully requests that the Honorable Court appoint a new attorney to represent Mr. Mitchell in this matter.

RODGER D. MITCHELL

BY COUNSEL



Michael D. Payne, Esq. (WV Bar ID#8839)
Redman, Payne & Muldoon, PLLC
100 Capitol Street, Suite 1009
Charleston, WV 25301
(304) 342-6800

IN THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

RODGER MITCHELL

Petitioner,

V.

CASE No. 06-C-8

WARDEN, Mount Olive
Correctional Complex

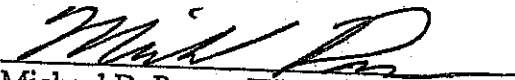
Respondent.

CERTIFICATE OF SERVICE

I, Michael D. Payne, Esquire, counsel for Rodger Mitchell, do hereby certify that service of the foregoing "Motion to Withdraw" was served on May 30, 2007, via U.S. Regular Mail, to the following:

Shannon Baldwin
Jackson County Prosecuting Attorney
P.O. Box 811
Ripley, WV 25271

Rodger Mitchell
By Counsel


Michael D. Payne (WVSB # 8839)
REDMAN, PAYNE & MULDOON, PLLC
100 Capitol Street
Suite 1009
Charleston, WV 25301
(304) 342-6800

IN THE CIRCUIT COURT OF JACKSON COUNTY WEST VIRGINIA

STATE OF WEST VIRGINIA EX RE
RODGER MITCHELL

- VS -

CIVIL CASE, NO 06-C-8
JUDGE THOMAS C EVANS

THOMAS Mc BRIDE, WARDEN, MOUNT
OLIVE CORRECTIONAL COMPLEX.
RESPONDENT

MOTION FOR DISQUALIFICATION OF JUDGE

On this date July, 02, 2002 comes the petitioner Rodger Mitchell Pro-Se, and moves Jackson County Circuit Court Judge Thomas C Evans III to independently recuse himself from case 02-F-22. Due to the court would have a personal interest in the issues that will be raised from the records of cases 01-F-25, and 02-F-22.

IN SUPPORT OF SAID MOTION THE PETITIONER ASSERTS THE FOLLOWING

1. The record of Jackson County Circuit Court cases 01-F-25, and 02-F-22 clearly shows after a full review that the Court knowingly erred many times, aided the prosecution, and permitted error to be conducted in favor of the prosecution.

2. The State prosecutor on July, 18, 2002 told to the Court, and what was to of been trial defense counsel that the all new case 02-F-22 had the very SAME discovery as the case this Court had dismissed without prejudice, case 01-F-25 during its trial. The Court, and defense counsel each knew full well there was no way the discovery to case 02-F-22 could be the SAME as the

dismissed case. Due to the only two grounds used by the Court for dismissing that case 01-F-25 Without Prejudice in favor of the defendant. The court as well as defense counsel each knew that if it would of been possible for the State to legally bring back case 01-F-25. A all new grand jury proceeding would of been absolutely necessary. The court as well as defense counsel each knew ahead of time that the State had changed the story of these teenagers to that it was Chrystal, and now the younger brother Vernon Ohler, the defendant was to of paid to drink alcohol. The court as well as defense counsel knew that in this cases discovery it was no longer Chrystal and Wilbur Ohler like the the State had charged in the dismissed case. Nor like the only investigating police officer to all of this had testified to, to case 01-F-25s grand jury. A grand jury proceeding where the State prosecutor took the time during those proceedings to check its notes to make sure that it was Chrystal, and Wilbur Ohler that the defendant was to of paid to drink alcohol, and not Chrystal, and Veron Ohler like is told in the new case 02-F22! This court knew these facts as did defense counsel. Yet failed to inform the defendant of this change in the discovery, and permitted defense counsel to do the same.

3. The Court as well as defense counsel each knew that in the dismissed case 01-F-25. The State charged the defendant with the crimes of affording Chrystal, and Wilbur Ohler alcohol. And again where the only investigating police officer testified to that cases grand jury that it was Charystal, and Wilbur Ohler, that the defendant was to of paid to drink alcohol, never once did officer Kenney testify to that grand jury that Veron Ohler did drink alcohol or that he was ever paid to drink alcohol. The court as well as defense counsel was also aware that Mrs, Jill Perrz was a sworn witness to this sworn testimony of officer Kenney to that cases grand jury, where he told that it was Charystal, and Wilbur Ohler that was to of been paid to drink alcohol with the defendant. The record shows that

Mrs, Jill Perrz was a sworn witness to officer Kenneys testimony at those proceedings. The indictment to case 01-F-25 was made a true bill on that fact. Never once did Mrs, Jill Perrz try to tell, or inform anyone that Mr, C Kennys testimony to that cases grand jury was incorrect, or wrong!

4. The Court as well as defense counsel was well aware that if the State were to of charged the defendant of the crimes of now affording Chrystal, and Vernon Ohler alcohol in this all new case 02-F-22. Like the State did in the dismissed case 01-F-25 with Chrystal, and Wilbur Ohler. The defendant again would of had the right to plead not guilty to these new charges, and again would have demanded his Constitutional right to a jury trial. A jury trial that this court as well as defense counsel knew would of had to of been conducted before the trial to case 02-F-22 to allow a jury to to decide weather or not this testimony that was yet to come from now Chrystal and Veron Ohler telling that the defendant had committed these newly accused crimes had truly been committed or not. Crimes that the defendant as sure as there is a hell would have plead not guilty to. Had he of been given the chance. The court, prosecutor, and defense counsel all three knew this! & the court and defense counsel permitted the State NOT to charge the defendant of these newly accused crimes in the indictment of case 02-F-22, then also by the court and defense counsel permitting the State to label this testimony that they knew was yet to come telling that this was 404(B) evidence. Would avoid affording the defendant his right to plead not guilty to these accusations, and demanding his United States Constitutional Right to a jury trial. But the way this court, prosecutor, and defense counsel worked this was by using the defevdants incompetents. They worked it to were the defendant was now permitted to be found guilty of these accusations by a very biased man. That has never been deemed competent to be, or hold the power of a West Virginia State Circuit Court Judge. That person being MR, Thomas C Evans, Sir!

5. The record clearly shows that the Court again aided the prosecution when he gave the State his ideal that in order for this impossible story to fly, The story that was finally told at trial by these two teenagers. That story being that the defendant was to of paid them to drink 20 mixed alcoholic drinks in a four hour period of time. The Court declared in favor of the prosecution that the defendant would of had to of put less alcohol in these drinks then a standard alcohol drink would of had in it. Never once attempting to give the defendant a benefit of a doubt that this did not happen. This was clearly the courts way of avoiding the dismissing of counts 1,2,4, and 5 of this all new indictment. As well as aiding in discrediting the possibility that there was no way this could of taken place in the matter these two teens testified to at trial , Then the record also clearly shows that the Court knowingly allowed the State to offer his ideal to the trial jury during the States closing arguments as its Owen to accomplish the same. Thereby the Court aided the State AGAIN!

6. This Court is also well aware of the time lines set by the rules of evidence on entering 404(B) evidence. Had this testimony that was yet to come that they permitted to be wrongfully labeled 404(B) evidence of been deemed evidence by a jury before trial and not by YOU! It then would not of been illegal and biasing testimony. Yet the record shows that the court as well as defense counsel permitted this to be labeled 404(B), evidence and went along with this. The court then permitted this wrongfully labeled 404(B) testimony to be allowed and entered from Chrystal, and Veron Ohler at trial to this incompetent jury that the defendant not just afforded these teens alcohol, but that he paid them to drink alcohol. As a already proven crime! The court, prosecutor, as well as defense counsel has had to of decided to put this act off of denying the defendant of these rights long before this so called trial!

7. The court at the motion of defense counsel did set all verdicts aside until a later date. In defense counsels motion for a new trial only one of the five grounds in this motion was addressed by this Court. The one ground addressed in the motion by the court was that all verdicts be dismissed due to the States failure to meet its burden of proof in all the counts in the indictment to case 02-F-22. The court as well as the prosecution knew full well that all the counts put before this incompetent jury had the exact same evidence. That being noting more then the testimony coming from these accusers, The Court again aided the State when it only dismissed a few of the counts in this cases indictment. Using the grounds that the State failed to meet its burden of proof, The court was well aware as was the prosecutor, that the State not only failed to meet its burden of proof on all counts in this indictment, but that it also failed to prove anything beyond a reasonable doubt, other then these two teens were at home where they should have been on this day in question. This fact of the record was proven by defense counsel when he intentionally called the defendants parents to the stand for the prosecution. This court knows that this proves noting of the crimes charged in the indictment as our United States Constitutional Bill of Rights demands! The court made this error and while defense counsel failed to object to the court for not dismissing all counts, this type of error is never waived. Had defense counsel objected he may well have created a record witch would support that all counts had to be dismissed. He should have requested that the court put to the record just what proof of the crime the counts had that this court did not dismiss that the ones the court did dismiss did not have. Had this of been done the court would of had little chose but to do one of two things. Dismiss all of the convictions, or flat out tell that the court is very biased against the defendant, and fully intents to maintain this conviction for the prosecution!!!

8. The record also shows that the court again aided the State prosecutor when it changed the dates on the indictment to case 02-F-22 to match the testimony of the accusers after hearing the testimony of the accusers in the matter of counts 9 and 13.

It is from these few issues raised from the records of cases of 01-F-25, and 02-F-22 the defendant is requesting that the Court on its Owen, disqualify its self from this matter. And also change the venue .

The defendant declares that after a full review of the record to cases 01-F-25, and 02-F-22 It would be totally unfair to the defendant to allow this court to over see or make any further rulings in this matter. Due to the fact that the court would have a large interest in the out come of the end result.

July 02, 2007
DATE

RESPECTFULLY SUBMITTED

Mr. Rodge Mitchell
DEFENDANT Pro-Se

IN THE CIRCUIT COURT OF JACKSON COUNTY
WEST VIRGINIA

This certificate of service is to verify that there has been three copies of this motion FOR DISQUALIFICATION OF JUDGE mailed by the United States Postal Service thru certified mail on the below said date to Mr,Keith Brotherton the Jackson County Circuit Court Cluck.

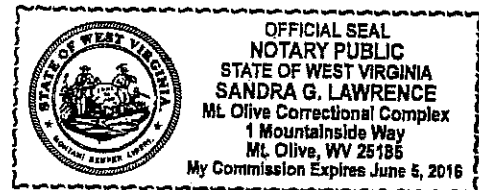
Mr. Rodger Mitchell
PETITIONER Pro-Se

July 2 2007
Date

Sandra G. Lawrence
Notary

CC Judge Thomas C Evans
Jackson County Circuit Court Judge

Jackson County Prosecutors Office



Appendix V

To ; Mr Thomas C Evans

Sir; Please be informed that over the last few weeks I have put together a petition for mandamus to your States Supreme Court of appeals. This Mandamus is in regard to your failur to respond to the motions of May,29,2007, and the motion of July,02,2007. These motions are pertaining to Jackson County cases #01-F-25,and # 02-F-22.

Mr,Evans on the day this ceritfyed and copyed letter is mailed to you I will allow you 20 days to respond to these motions. If at the end of this 20 days you have not yet reapedonded I will then ~~subm~~itt this Mandamus to the State Supreme Court along with the motions. A copy of this letter to you will also be atatched to this mandamus.

Mailed:

August 12, 2007
Date

Thank You !

M. D. Mitchell
Sender

Sandra G. Lawrence
Notary

